

Bus ads cause controversy — DART dodges free exercise, hits free speech

(Editor's note: The following essay received first place in the annual Drake law student writing contest in the spring of 2010. One of the benefits of winning the contest includes publication in the Iowa Lawyer. Space limitations and the timeliness of other articles prevented it from being published until now.)

By Christopher R. Steffe*

The controversy

DART (Des Moines Area Regional Transit Authority) is responsible for the transportation of passengers between the City of Des Moines and its surrounding communities. As Polk County's principal bus service, it operates more than 100 buses that cover more than 15,000 miles daily, bussing passengers to "shopping malls, major business districts, residential areas and schools."

In support of its mission of providing low-cost fares to the public-at-large, DART permits limited advertising on

both the interior and exterior of its buses, subject to an established policy which, for example, restricts advertisements to those which are not false, misleading, deceptive, disrespectful, obscene, offensive or encourage illegal behavior.

In August, 2009, as a part of a national concerted effort organized by the United Coalition of Reason, the Iowa Atheists and Freethinkers (IAF) launched an advertising campaign to raise awareness of the group's existence. IAF contracted with DART to purchase exterior advertisements on 20 DART buses. These advertisements, which consisted of a blue sky and clouds, read, "Don't believe in God? You are not alone," and were scheduled to coincide with the Iowa State Fair.

However, soon after their debut on buses around Des Moines, DART received numerous phone calls from offended local residents. As a result of these complaints, DART promptly removed them, stating

that the signs were installed on the buses before the advertising commission formally approved them.

After protest by the IAF and ACLU, DART reconsidered its action, and in a decision rendered days after the advertisements were originally displayed, DART reached a compromise wherein it redisplayed IAF's advertising on the buses as they were originally installed.

Has a violation occurred?

In removing the advertisements without the consent of the IAF, DART impermissibly violated IAF's freedom of speech. More specifically, DART engaged in viewpoint discrimination, which "occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond, as outlined in *Rosenberger v. Rector & Visitors of Univ. of Va.* 515 U.S. 819, 894 (1995) (Souter, J., dissenting.)"

In order to establish a freedom of speech violation in which the government engages in viewpoint discrimination, one must examine what type of forum is being regulated.

Traditionally, the modern analysis has recognized three types of fora for First Amendment purposes—traditional public fora, designated public fora, and nonpublic fora. The classification of the forum at issue informs the relevant legal standard for whether certain types of government action are permitted in the context of freedom of speech.

In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the United States Supreme Court addressed the question of what sort of forum is established when a city permits advertisements in city-operated buses. Although *Shaker Heights* pre-dates the Supreme Court's three-fora analysis, the *Shaker Heights* classification still comports with the three-fora analysis.

Characterizing bus-advertising as a commercial venture and analogizing it to various forms of media, including newspapers, periodicals, radio stations and television stations, the Court held that bus-advertising was a nonpublic forum, explaining that "[the city] need not accept every proffer of advertising



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from the general public [because] a city transportation system has discretion to develop and make *reasonable* choices concerning the type of advertising that may be displayed in vehicles." The reasonableness of the government's exclusion of access in a nonpublic forum should be evaluated "in the light of the purpose of the forum and all the surrounding circumstances" and such exclusions must be viewpoint neutral. *Cornelius v. NCAAP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806, 809 (1985).

Concerning DART, it is clear from the First Amendment jurisprudence of the Supreme Court that advertising on a city-operated bus constitutes nothing more than a nonpublic forum. Unlike a public forum, which has been "immemorially held in trust for the use of the public . . . and used [traditionally] for purposes of assembly, communicating thoughts between citizens, and discussing public questions," advertising on the side of city buses has never traditionally been a bastion of free speech and the communication of information and ideas. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

Instead, the primary purpose of permitting advertising is to raise additional revenue for DART's operations. Further, unlike a designated public forum, DART has never actually opened up the forum for the general public as a place for expressive activity. Advertising has traditionally been restricted by DART's advertising policies that prohibit certain types of advertisements from appearing on its buses, such as those that are obscene, encourage illegal behavior, or promote alcohol.

Despite the forum's nonpublic status, DART does not maintain plenary authority to dictate policies and procedures concerning advertising on its city buses. Any regulation propounded by DART must be reasonable in light of the purpose of the forum and must be viewpoint neutral.

In *Shaker Heights*, the court held that the restrictions on political advertising on city buses were reasonable because allowing political advertising could result in jeopardizing the bus system's financial stability by encouraging short-term candidacy or issue-oriented advertisements, assaulting passengers with constant barrages of political

propaganda, and even questioning the political impartiality of administrators in doling out advertisement spots. The Court held that these reasons were sufficiently reasonable as well as viewpoint neutral because the prohibition on political advertisements applied to *all* political advertisements, regardless of their content.

Although there is scant evidence of what DART would consider its reasonable justifications in removing the IAF advertisements from its buses, it is likely that DART would proffer arguments analogous to those which were argued by the city in *Shaker Heights*. First, DART could argue that the unique context in which the advertisements exist creates a captive audience. This captive audience would consist of commuters who ride the bus system and perhaps even those on the street who are not necessarily commuters, but are still subjected to the advertisements involuntarily.

Second, DART might also argue that permitting IAF's advertising to remain on its buses could jeopardize DART's future revenue generated by advertising through the marginalization of riders and advertisers. A certain population segment consisting of frequent, theist-bus commuters who are offended may decide to boycott certain buses or the bus system altogether. Advertisers may either not support the message that is being delivered by the advertising and decide to cease advertising with DART or may be practically unable to actually advertise with DART because of the influx of short-term or issue-oriented politics that might squeeze out more frequent and long-term advertisers.

Third, just as the Court in *Shaker Heights* articulated a concern that political favoritism may surface if political advertisements were allowed on city buses, DART would likely argue that it should not cross the line into religious advertising because of its highly and potentially divisive nature.

Ad removal not supported

A critical evaluation of these justifications, however, demonstrates the hollow ring in each of them. The captive audience argument would necessarily fail because a captive audience cannot really exist in this context. Unlike the proposed political advertisements placed

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inside the city's buses in *Shaker Heights*, the advertisements that were utilized by IAF were external advertisements visible only to the outside observer. Thus, no bus rider would have to be subjected to such an advertisement and be unable "to effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Shaker Heights*, 418 U.S. at 320 (Brennan, J., dissenting).

Further, a captive audience argument in respect to bus commuters and non-commuters who are outside of the bus is also untenable as a justification. Cohen would preclude such a finding. *Cohen v. California*, 403 U.S. 15, 22 (1971) ("[T]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."). Those who are merely walking along a sidewalk and are instantly exposed to the IAF advertisement would be able to avert their eyes. This conclusion is strengthened because sidewalks have been traditionally viewed as an open forum.

Although one might distinguish this by arguing that the advertisement exists on a city-owned bus that is driving on public roads and not on the public roads themselves, such a distinction is pedantic

and unimportant because either way the bystander is exposed to the advertisement. Further, the very itinerant nature of buses guarantees that although a bystander may be exposed to the IAF's advertisement for a period of time, that duration is so short as to reasonably preclude a justification.

The second argument, that the IAF's advertisement may marginalize commuters and advertisers, is similarly weak at best. Although it would be foolhardy to believe that the advertising would not offend any commuters or advertisers, arguing that the advertising would jeopardize future revenues is extreme. DART serves a critical role in the greater Des Moines community in creating a system of efficient and cheap transportation for the public. Knowing the key role DART plays in the community, it is highly unlikely to conclude that continuing to publish the IAF advertisements would result in a massive boycott of the transportation system. In fact, reports have shown that there has been benefits for both the IAF and DART since DART first published IAF's advertisement—IAF has nearly doubled its state membership while DART has experienced an increased interest in advertising on its buses—and once the

novelty of the issue runs its course, there will likely be little remaining public opposition. Further, establishing reasonable, objective, and uniform regulations that govern the process through which advertisements are submitted and accepted will preempt any legitimate question of favoritism.

Finally, the argument that permitting advertisements such as the IAF's will squeeze out long-term advertisers is untenable because such "short-term" advertisements exist in contexts other than IAF's and any concern could be remedied via a formally established procedure which would prefer longer-term

advertising contracts over short-term contracts.

The last argument, that permitting IAF's advertisement would cause DART to venture into the controversial territory of religion, is also weak. A close examination of the IAF's advertisement shows that the advertisement is not merely attempting to convert theists to atheism. Instead, the advertisement, which reads, "Don't believe in God? You are not alone," is a call-to-arms for IAF's fellow atheists who may mistakenly believe that there is no local social support structure for atheists and freethinkers.

Unlike the political advertisement at issue in *Shaker Heights*, which was a direct appeal to viewers to vote for the political candidate in an upcoming election, the IAF advertisement was a part of a national project coordinated by the United Coalition for Reason, an organization whose main goal is the promotion of the social networking of atheists, not the conversion of believers into nonbelievers. By permitting IAF to continue to advertise on the sides of its buses, DART would be simply furthering this non-religious, social goal.

Finally, the most persuasive counter-argument against DART would be to examine DART's history of advertising. In *Shaker Heights*, the Court found persuasive the fact that the city, in its 26 years of operation of public transportation, never once accepted any political advertising on any of its buses. DART, on the other hand, has traditionally accepted advertisements which are comparable to the IAF's—as Elizabeth Prusetti, DART's Chief Development Officer, stated, "We've had churches advertise [before], but it's been for their church and not a belief."

It is clear that past advertising of churches on DART buses are not dissimilar from the IAF's advertisement. This is especially true since IAF's advertisement was not a tool used for the recruiting of believers to atheism, but instead a method to raise awareness of the group's existence in Iowa. Thus, it appears that not only is there not a reasonable justification for the intrusion into the free speech rights of the IAF, but that the intrusion itself was nothing short of viewpoint discrimination against IAF.

*Christopher Steffe graduated from Drake University Law School in May 2010, and was admitted to the Iowa Bar in September.



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